

PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298



October 4, 2002

TO: ALL PARTIES OF RECORD IN RULEMAKING 93-04-003 et al.

Decision 02-09-050 was mailed without the dissent of President Loretta M. Lynch.
Attached herewith is the dissent.

Very truly yours,

/s/ CAROL A. BROWN (by ANG)
CAROL A. BROWN, Interim Chief
Administrative Law Judge

CAB/tcg

President Loretta M. Lynch, Dissenting:

I agree with the technical analysis of this decision and believe it presents the Commission with a thoughtful, articulate analysis of the record developed over the last four years. I remain concerned, however, that an affirmative vote on this decision is untenable under state law. Because I cannot agree with the decision in its entirety, I have reluctantly concluded that I must vote no.

To proceed with our recommendation to the FCC and to vote today, we must harmonize the requirements of state law with federal law.

Section 271 of the 1996 federal Telecommunications Act (Telco Act) and Section 709.2 of the California Public Utilities Code both strive to ensure healthy local and long distance telecommunications markets by setting specific entry standards. The two sets of criteria present subtle but critical differences.

As the majority decision notes, Section 271 approaches the accessibility of the local exchange market by meeting the 14-point checklist. Federal law, as embodied in Section 271, also requires consideration of the public interest assessment of a Bell Operating Company's entry into the long distance market. By contrast, California Public Utilities Code Section 709.2, enacted in 1994, identifies criteria which the PUC must use to assess the public interest from the perspective of the health of the intrastate interLATA market.

The majority decision finds that, based on the exhaustive analysis of the assigned commissioner, ALJ and staff, Pacific Bell has met twelve of the

fourteen checklist items -- for about an 86% success rate. The decision also finds that Pacific Bell meets one of the four criteria set forth in Section 709.2, or 25%. One can debate for a long time whether the Commission's standard for endorsing Pacific Bell's 271 application should be 100% of the 271 and 709.2 criteria, or 86%, or something less. But by any measure, a 25% success rate for statutorily-mandated criteria is not a passing grade, and it presents this Commission with a difficult choice.

Ultimately, the Commission must decide whether a vote to endorse SBC Pacific Bell's 271 application at the Federal Communications Commission (FCC) is consistent with our legal obligation to uphold both state and federal law. California Public Utilities Code Section 709.2, enacted two years prior to the Telco Act, requires this Commission to determine that (1) competitors have fair, nondiscriminatory access to exchanges, (2) there is no anticompetitive behavior by the local exchange telephone corporation, including unfair use of subscriber contacts generated by its provision of local service, (3) there is no improper cross-subsidization of interexchange telecommunications service, and (4) there is no substantial possibility of harm to the competitive intrastate interexchange telecommunications markets.

These state law criteria do not precisely match the Telco Act's 271 requirements, but they both clearly contain the public interest criteria as a critical component. In Section 271 (d)(3)(c), the Telco Act anticipated that it would be critical for the FCC to consider not only the fourteen point checklist, but public interest criteria as well, by providing that the FCC *"shall not approve authorization requested in an application submitted...unless it*

finds that ...the requested authorization is consistent with the public interest, convenience, and necessity."

Our responsibilities as state public utility commissioners mandate that we follow and respect both state and federal law. That mandate requires us to try to harmonize statutes to be able to respect all laws. Certainly, the state Section 709.2 requirements provide a benchmark by which to evaluate the public interest of SBC Pacific Bell's 271 bid. The question is, do the federal 271 requirements pre-empt or supercede requirements imposed by state law? In my view, the ability of states to impose requirements is not inconsistent with federal law. Indeed, the ability of states to prescribe additional requirements is clearly articulated in the Telco Act.

Section 253 (b) of the Telco Act provides that *"nothing in this section shall affect the ability of a state to impose, on a competitively neutral basis and consistent with section 254 of this section, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."*

In fact, the Telco Act also contains a Savings Clause in Section 601(c)(1), that puts to rest any doubt on this question: *"no implied effect - this act and the amendments made by this act shall not be construed to modify, impair, or supersede federal, state or local law unless expressly so provided in such act or amendments."*

Further, Section 261 (b) of the Telco Act States that *"nothing in this part shall be construed to prohibit any state commission from enforcing regulations prescribed prior to February 8, 1996, or from prescribing regulations after such*

date of enactment, in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part. ”

Finally, Section 261 (c) provides that *“nothing in this part precludes a state from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the state’s requirements are not inconsistent with this part of the commission’s regulations to implement this part.”*

Thus, we need not decide whether federal law preempts state law – indeed, we cannot under the California Constitution¹ – because we have the ability and the obligation to harmonize the requirements of federal and state law. Put simply, according to the majority decision that reflects four years of analysis by the ALJ and staff, we can conclude at this time that Pacific Bell has met only the first requirement of state Public Utilities Code Section 709.2. The provisions of Section 709.2 are not pre-empted by, and indeed such state law provisions were anticipated by federal law. Any decision endorsing SBC Pacific Bell’s 271 application to enter the intrastate long distance market without making the affirmative findings required by state law violates state law. As a body, and as individual commissioners, we are bound by our oath of office to act according to the laws of the state of California. This decision does not comport with the requirements of

¹ Article 3, Section 3.5 of the California Constitution, provides that “An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:.... (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

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Section 709.2 because this decision does not contain the requisite affirmative findings as clearly articulated by state law.

Some of my colleagues have argued that this decision does not actually authorize or direct competition in intrastate interexchange telecommunications, as contemplated in Section 709.2; therefore, we need not feel bound to evaluate the Section 709.2 requirements in this decision. I respectfully disagree with this conclusion. The Telco Act requires the FCC to consult with the states in making its determination of a Regional Bell Operating Company's compliance with Section 271. Practically speaking, it is highly unlikely the FCC would move forward on Pacific Bell's application without a recommendation from this Commission.

If this Commission's action was either insignificant or unnecessary, why did we spend so many resources and so much time on this case over the past four years? If this vote on this decision does not constitute an action as contemplated by Section 271, what is it that we do here today? It strains more than credulity to define this decision and our vote today as an advisory opinion as distinct from an action; it strains the law and the process. By attempting to redefine the essence out of the fundamental way we fulfill our oaths of office – through our public votes on decisions crafted in our public proceedings – we undermine the respect for and the legal consequences of our decisions. If a vote on this decision does not constitute an action of this Commission, what is the legal or statutory support for the vote we take here today? Thus, the vote we take today falls within the definition of an action as contemplated by P.U.Code Section 709.2.

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If the FCC ultimately approves Pacific Bell's long distance bid, little is left for this Commission to act upon with regard to whether Pacific Bell may offer intrastate intraLATA service. Apart from that threshold question, I believe the PUC has the authority and the ability to address *how* intrastate long distance could be provided in a way that satisfies Section 709.2.

The bottom line is that we cannot make the findings we are required to make under state law. Pacific Bell has made significant progress in opening its local networks and systems to competitive local exchange carriers. Unfortunately, the record we have in this case, despite the fact that it was four years in the making, simply does not allow us to make the remaining three findings required by state law at this time. I am therefore deeply troubled whether a yes vote on this decision is tenable under state law.

For that reason, after carefully evaluating the law and the facts, I have reluctantly concluded that I cannot find that it would be in the public interest to support the decision as a whole.

Dated September 19, 2002 in San Francisco, California.

/S/ LORETTA M. LYNCH

Loretta M. Lynch
President